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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DARIUS FLOURNOY, Defendant and Appellant.	D074074 (Super. Ct. No. SCD275297)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed.

John E. Edwards, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kristen Ramirez and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Darius Flournoy of carjacking (Pen. Code,[1] § 215, subd. (a); count 1), carrying a concealed dirk or dagger (§ 21310; count 2), and giving a false name to a peace officer (§ 148.9, subd. (a); count 3). The jury also found true that Flournoy used a deadly and dangerous weapon to commit the carjacking (§ 12022, subd. (b)(2)).

The court sentenced Flournoy to prison for five years, consisting of the low term of three years for count 1, plus two years for the weapon use enhancement. The court also sentenced Flournoy to prison for two years under count 2 but stayed that sentence under section 654. As to count 3, the court sentenced Flournoy to time served.

Flournoy appeals, arguing that we must remand this matter to allow the trial court to consider granting Flournoy mental health diversion under section 1001.36, which became effective after Flournoy committed his offenses. To this end, Flournoy asks this court to follow *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, S252220, and conclude section 1001.36 is retroactive.

Our high court granted review in *Frahs* to address whether the mental health diversion statute applies retroactively. Yet, we do not need to weigh in on this issue. Section 1001.36, even if retroactive, only applies if a "court is satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders . . . ." (§ 1001.36, subd. (b)(1)(A).) On the record before us, there was no evidence that Flournoy suffers from a mental disorder or

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1 Statutory references are to the Penal Code unless otherwise specified.

that the mental disorder was a "significant factor in the commission of the charged offense." (See § 1001.36, subds. (b)(1)(A) & (B).) Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Offenses

In the early morning hours, a man was loading his laundry into his car near San Diego State University. As the man turned to close his car door, he discovered Flournoy standing next to him. Flournoy showed the man an object in his waistband, which the man believed was a gun. Flournoy grabbed the object like he was about to use it. Flournoy said, "You didn't see my face," and ordered the man to give him the car keys. The man complied before fleeing. Flournoy then got into the car, backed into another car, and drove off.

The man called 911 and reported the carjacking. Shortly thereafter, the police pulled over Flournoy, who was still driving the man's car. Flournoy had a knife with an eight-inch blade tucked into his waistband. Flournoy provided the officers a false name and date of birth multiple times. The man was driven to Flournoy's location where he identified Flournoy at a curbside showup.

The Sentencing Hearing

After the jury found Flournoy guilty, but before the court sentenced him, the court stated that it "would assist the court to have a psychiatric or psychological evaluation as to [Flournoy's] mental state and mental well-being." After observing Flournoy during trial as well as observing and listening to the evidence at trial, the court expressed that it "still [had] some concerns with" Flournoy's mental health. The court also raised concerns

regarding statements Flournoy had made to the probation officer. For example, Flournoy asserted that he could not remember being arrested and did not know how or why he was in jail. He also thought he was being asked too many questions. He indicated that he was confused. The probation report also noted that Flournoy had a blank stare at times, to which the court commented that it had "observed a little bit of that during trial." However, the court noted its limitations in evaluating Flournoy, stating perhaps Flournoy simply behaved as he normally does.

The court also observed that the probation report indicated that Flournoy was homeless at the time of his arrest; Flournoy was not sure he ever had a job; and Flournoy was unsure if he had any medical problems. As such, the court recommended that Flournoy undergo a psychological diagnosis.

After consulting with his attorney, Flournoy chose to proceed with the sentencing hearing without an evaluation. Nevertheless, Flournoy's trial attorney asked the court to order a psychological evaluation if it believed it was necessary to appropriately sentence Flournoy. The court asked Flournoy if he would waive time to allow for a psychological evaluation of him, but Flournoy declined to waive time. At that point, defense counsel stated, "[N]ot to make any sort of inappropriate representations, but I do believe that there was something that could come out of a beneficial circumstance that I believe Mr. Flournoy could be in a position to waive time for an evaluation." The court responded that there was no guarantee the evaluation ultimately would benefit Flournoy but stated that it was "something [it] would need, would like to have." Yet, because Flournoy

would not waive time, the court proceeded with sentencing, ultimately sentencing Flournoy to prison for five years.

DISCUSSION

Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (§ 1001.36, subds. (a) & (b)(1)(A).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subds. (b)(1)(A)-(F).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Effective January 1, 2019, the Legislature amended section 1001.36, to exclude those defendants charged with certain crimes. (See § 1001.36, subd. (b)(2)(A)-(H).) Flournoy was not charged with any of these disqualifying crimes.

The parties spend the lion's share of their respective briefs arguing about whether section 1001.36 is retroactive. However, the People point out that, on the record before us, there is no evidence that Flournoy suffers from a mental health disorder or that any such disorder played a significant role in the commission of the charged offenses. (See § 1001.36, subds. (b)(1)(A) & (B).)

Flournoy counters that the People's argument is not of the moment because remand is not contingent on whether Flournoy could successfully seek diversion. Instead, Flournoy asserts that he "should be given every opportunity that a defendant would have at the outset of a case to submit evidence of a psychological condition contributing to his offense and to seek diversion based upon that evidence." Flournoy acknowledges that section 1001.36's application is not so broad that it allows all defendants to vacate their convictions and seek diversion under the statute. Thus, he argues that section 1001.36 "should be available only . . . to those who can demonstrate that serious questions exist regarding their mental state and fitness so that an application for diversion would not be a mere exercise in futility." Flournoy insists that he qualifies under that criteria because he "exhibited behavior that was so odd that it caused the trial judge to raise serious concerns regarding the need for a psychiatric or psychological evaluation." We disagree with Flournoy that the record before us raises significant concerns that he is suffering from some mental health disorder.

Before and during trial, the defense never made Flournoy's mental fitness an issue. There was no argument that Flournoy was not competent to stand trial. The defense did not assert at trial that Flournoy was insane at the time he committed his offenses. Indeed, there was no evidence offered at trial that Flournoy had any mental health issues. Not surprisingly, there are no psychological evaluations of Flournoy for us to consider. As such, there is no doctor who diagnosed Flournoy as suffering from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. (See § 1001.36, subd. (b)(1)(A).) In fact, at his sentencing hearing, Flournoy declined to submit to a psychological evaluation even after the court suggested one might be helpful in terms of sentencing.

Additionally, there is nothing about the circumstances of the crimes committed that even suggests Flournoy was suffering from a mental disorder at that time. To the contrary, Flournoy's offense appears to be a garden variety carjacking. He threatened the victim with a weapon and took the victim's car. There was no evidence adduced at trial that Flournoy was acting bizarre at the time he committed the offenses. During closing argument, defense counsel did not argue Flournoy suffered from some disorder that affected his ability to form the specific intent for the crime of carjacking.[2] Instead, she argued that someone else stole the car and gave the keys to Flournoy before the police pulled him over. In short, Flournoy's mental fitness was never an issue at trial.

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2 Carjacking is a specific intent crime because in addition to the proscribed taking of the vehicle by force or fear, it requires that the defendant act with the specific intent to "either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession." (§ 215, subd. (a); CALCRIM No. 1650.)

At most, Flournoy can point to the court's comments at the sentencing hearing and a few lines in the probation report to support his claim that we should remand this matter, so he can seek diversion under section 1001.36. However, we do not find the court's comments or the probation report sufficient to warrant remand.

The trial judge commented that it noticed Flournoy's blank stare "a little bit . . . during trial." But the judge admitted that he was not a doctor and Flournoy simply could have been behaving as he usually did. In other words, the court did not have any baseline to which it could compare Flournoy's courtroom behavior.

The court also seemed to be very concerned about Flournoy's statements to the probation officer that he could not remember being arrested and did not know how or why he was in jail. Additionally, the court was troubled that Flournoy told the probation officer that he was "confused, [and there were] too many questions." The court further noted that Flournoy was homeless at the time of his arrest, was not sure if he ever had a job, and was unsure if he had any medical problems.

In addition to the portions of the probation report the court highlighted, we observe that Flournoy told the probation officer that he believed he was under the influence of drugs when he committed his offenses, but he did not know which drugs.[3] Additionally, he denied that he had been diagnosed with any psychological disorders. Further, Flournoy was selective with the specific personal information he provided to the

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[3] Subsequently, Flournoy told the probation officer that he had taken Xanax at some point in his life, but he did not use it very often. That said, Flournoy refused to clarify how often he took that drug. Further, he denied using any other drug and claimed that he did not consume alcohol.

probation officer. For example, although he admitted to being born and raised in San Diego and said he received a high school diploma, he claimed that he could not recall anything from his childhood, including who raised him. Yet, he stated that his family or " 'somebody' " would buy him food because he has no source of income. In addition, Flournoy gave conflicting information about his drug use. Also, when asked if he was affiliated with any street gangs, Flournoy laughed, said " 'yes' " but then changed his answer to " 'no.' " According to his juvenile probation records, however, he was associated with a gang.

In short, we find Flournoy's comments to the probation officer inconclusive in showing that he was suffering from any mental health disorder. Flournoy denied ever being diagnosed with a mental health condition, and there are conflicting accounts that he might use drugs, including at the time of the incident.

In reaching our conclusion that remand is not warranted on the record before us, we emphasize that we are not creating a standard wherein a defendant must show on appeal that he or she would successfully move under section 1001.36 for diversion. That said, we note that section 1001.36 is a pretrial diversion program. (See § 1001.36, subd. (b)(1).) Therefore, before ordering remand under that statute, we need to see something in the record indicating that the defendant's mental fitness was at issue before or during the trial. In the absence of such evidence, at the very least, the record should contain substantial evidence that supports the conclusion the defendant could be suffering from a mental disorder. Although we will not illustrate any specific examples, such evidence logically would include an indication that, at some point in the defendant's life,

he or she suffered from a mental health disorder. Here, we have no such evidence. Thus, in the absence of evidence on the essential issue of Flournoy's mental health, we cannot order remand.

Finally, if Flournoy believes he is entitled to section 1001.36 relief, he is not without a remedy. "An appeal is 'limited to the four corners of the [underlying] record on appeal . . . ." (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1.) However, a habeas corpus petition is not and extends to matters outside the record. (*Ibid*.) Again, based on this record, Flournoy has not shown he would even be a candidate for diversion under section 1001.36 assuming that the statute is retroactive.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.